

Written evidence submitted by New Zealand Clerk of the House of Representatives

Thank you for the invitation to make a submission to your inquiry into select committee powers and contempts.

References below to Standing Orders and Speakers' Rulings refer to the 2017 editions, available on the Parliament website www.parliament.nz. The latest edition of Parliamentary Practice in New Zealand (PPNZ), referenced below, is also available on the website.

I would be happy to provide further information on any of the below material, should you deem it helpful to your inquiry.

1. What powers do committees (investigative/select) in your Parliament have to summon witnesses and call for the production of documents? Are these powers set out in legislation or in standing orders?

There are 12 multi-function subject select committees and 5 specialist select committees established at the commencement of each Parliament in New Zealand. Of these, only the Privileges Committee has the power to send for persons, papers, and records delegated to it by the House (Standing Order 401(2)), in recognition of the committee's quasi-judicial status. All other committees must apply to the Speaker under Standing Order 197 for the issue of a summons. The Speaker must be satisfied that the evidence, papers, or records sought are necessary to the committee's proceedings and that the committee has taken all reasonable steps to obtain the evidence, papers, or records. A similar test may be applied by the Privileges Committee in exercising its power, but this is a matter of practice rather than a requirement set out in Standing Orders.

During the 52nd Parliament, an ad-hoc select committee—the Epidemic Response Committee—was established by resolution of the House and was granted the power to send for persons, papers, and records. The committee was established on 25 March 2020 and disestablished on 26 May 2020.¹

¹ Motion to establish: (2020) 745 NZPD 17316. Motion to disestablish: (2020) 746 NZPD 17962.

The powers of committees are set out exclusively in Standing Orders, or, as in the case of an ad-hoc select committee, in a resolution of the House. However, the power to send for persons, papers and records must be exercised in accordance with the general law.

All committees had the power to send for persons, papers, and records from 1929 until 1999, when the Standing Orders Committee recommended the current procedure for application to the Speaker. It is thought that there was only one attempt to exercise the power in the 20th century, in 1996. In recommending the removal of the delegation of this power to committees, the Standing Orders Committee acknowledged that the power might constitute a serious infringement of civil liberties, and that the power must be exercised in a way consistent with the right not to be subjected to an unreasonable search or seizure.²

For further information, see PPNZ at pp. 494–7.³

2. Are there any recent examples from your Parliament of contempts relating to investigative committees, including non-compliance of witnesses summoned to appear before a Committee?

There are no recent examples of non-compliance of witnesses summoned to appear before a committee resulting in charges of contempt. However, the following examples may be relevant.

The last time the power to send for persons, papers, and records was exercised to compel a witness to attend a select committee to give evidence was in June 1996, by the Justice and Law Reform Committee. Three summons were issued for members of the Road Knights gang to appear before the committee, although only one was successfully served.⁴ The individuals summonsed did not appear before the committee. Media reports record that Opposition members of the select committee wished to see the summonsed individuals fined, and that one member wrote to the Speaker raising a matter of privilege. No question of privilege was referred to the Privileges Committee and no further action was taken.

The only other recent exercise of the power to send for persons, papers, and record, was for documents rather than persons. In May 2020, the Epidemic Response Committee issued three summonses to three Crown office holders⁵ for legal advice provided to them regarding the legality of lock-down orders issued in response to the COVID-19 pandemic. The summonses were initially challenged on the grounds that the committee lacked the power to compel the provision of legally privileged advice. However, the power to do so had existed since 1865, when the House acquired the privileges and powers of the House of Commons, and had been confirmed in a relatively recent report on the Standing Orders.⁶ In the end, heavily redacted versions of various pieces of advice were provided to the committee. Although there was contention over the use of the power and the response received, the matter was not pursued any further.

² Standing Orders Committee *Review of the operation of the Standing Orders* (2 September 1999) [1996-1999] AJHR I.18B at 16.

³ Mary Harris and David Wilson *McGee Parliamentary Practice in New Zealand 4th Edition* (Oratia, Auckland, 2017) at 494-7.

⁴ Kirk, Jeremy, 'Moore asks committee to discipline Nat MPs', *The Press*, 22 June 1996, Edition 2, Page 1.

⁵ The Solicitor-General, Director-General of Health and the Commissioner of Police.

⁶ Report of the Standing Orders Committee, 2003, I. 18B, p. 31.

3. What sanctions are available to your Parliament in cases of non-compliance or other contempts on the part of witnesses?

The following types of sanctions may be applied to witnesses found to be in contempt of the House:

- Requirement to apologise (written or verbal)
- Exclusion from the parliamentary precinct
- Exclusion from the Parliamentary Press Gallery (for accredited members only)
- Formal censure (written or verbal)
- Fine (not exceeding \$1000)
- Imprisonment

The power to imprison has never been exercised by the House in New Zealand, although the power's existence is not disputed.⁷

The power to fine was previously contested, but is now confirmed in section 22 of the Parliamentary Privilege Act 2014. There have been five instances of fines being imposed by the House in the history of the Parliament. The most recent example was in 2006, when a State-owned television broadcaster was fined for “disadvantaging” its chief executive on account of evidence he had given before a select committee.⁸ The broadcaster was required to pay a fine of \$1000.

Members of Parliament cannot be summoned by a committee possessing the power to send for persons, papers, and records, but the House may issue such a summons.⁹ In addition to the above sanctions, members of Parliament may be suspended from the service of the House, which automatically includes the docking of pay. Deductions from members' pay are legislated for in section 14 of the Members of Parliament (Remuneration and Services) Act 2013. The House may not expel its members.

PPNZ describes the punishments available in contempt proceedings at pp. 794-801.

4. What rules and guidelines do you have to ensure witnesses and potential witnesses before select committees are treated with fairness and due respect?

There are no prescriptive or exhaustive rules regarding the fair treatment of witnesses. The chairperson of each committee is responsible, along with the other members, for the conduct of the committee's proceedings. Speaker's Ruling 83/1 affirms that in discharging their role as presiding officers, chairpersons “must regard the interests of the House as paramount” and that these interests are served when, among other guidelines, “participants in parliamentary processes are treated fairly and respectfully”.

Standing Orders 222 – 228 cover conduct of hearings of evidence. They grant witnesses the right to raise matters of concern with a committee before a hearing (SO 223); state that the examination of witnesses is conducted as the chairperson, with the approval of the committee, directs (SO 224); set out that questions must be relevant (SO 225); as well as procedures for witness objection to answering relevant questions (SOs 226-227). Standing

⁷ Mary Harris and David Wilson *McGee Parliamentary Practice in New Zealand 4th Edition* (Oratia, Auckland, 2017) at 795.

⁸ Privileges Committee, *Interim report on question of privilege on the action taken by TVNZ in relation to its chief executive* (6 April 2006) [2005–2008] AJHR I.17A.

⁹ Mary Harris and David Wilson *McGee Parliamentary Practice in New Zealand 4th Edition* (Oratia, Auckland, 2017) at 496.

Order 228 states that witnesses may be accompanied by counsel, and the acts that counsel may undertake on behalf of their client. This includes raising objections to questions on the ground of relevance and objecting to their client answering questions.

Standing Orders 232 – 238 cover the natural justice obligations applying to committees. This includes procedures that must be followed in the event that an allegation is heard or received in writing that may seriously damage the reputation of a named or identifiable person, as well as rules excluding members of Parliament from committee proceedings on the basis of apparent bias. The procedures concerning allegations are used frequently by committees, while those concerning apparent bias are not. These Standing Orders give parliamentary expression to the statutory obligation on the House to observe the right to natural justice enshrined in the New Zealand Bill of Rights Act 1990.¹⁰

5. What is your assessment of the effectiveness of your Parliament's powers and sanctions to deal with contempts?

There have been few occasions in recent memory where the effectiveness or adequacy of Parliament's powers and sanctions to deal with contempts have been tested, perhaps reflecting a similar attitude in New Zealand to that endorsed by the House of Commons in 1978 regarding the sparing exercise of Parliament's penal powers—particular with regard to members of the public. Moreover, there has been little experience in New Zealand of high-profile parliamentary inquires seeking evidence from recalcitrant individuals or organisations as there has been in the UK.

In confirming the power to fine for contempt in legislation in 2014, the House set itself a limit of \$1000. Although the matter was not widely debated in the House, the sum does reflect an acknowledgement that the power is of symbolic rather than punitive or deterrent value. As the Privileges Committee put it when recommending the exercise of the power to fine in 2006:

As we have noted, State enterprises have already received a strong warning about their obligations to Parliament and its committees. For that reason we are not prepared to merely accept an apology as the end of the matter. The quantum of the fine we recommend is less significant than the fact that Privileges Committee, for the first time in 103 years, is recommending that a fine be imposed.¹¹

The same can perhaps be said of the exercise of the contempt jurisdiction more generally. The infrequency of the exercise of Parliament's penal powers only serves to enhance its symbolic impact. The mere possibility of contempt proceedings is generally sufficient to ensure that the House is not obstructed or impeded in its functions.

The New Zealand Parliament is well-equipped to uphold its privileges and guard its constitutional functions through its contempt jurisdiction. It has also shown itself willing to take action to protect its privileges when necessary, as evidenced by the Parliamentary Privilege Act 2014. Should future challenges arise, I expect consideration will be given to the

¹⁰ See New Zealand Bill of Rights Act 1990 s 3 (application to legislative branch); Mary Harris and David Wilson *McGee Parliamentary Practice in New Zealand 4th Edition* (Oratia, Auckland, 2017) at 12, and Philip A Joseph, "Report to the Standing Orders Committee on Natural Justice (1995)" in Standing Orders Committee *Review of Standing Orders* (13 December 1995) [1993–1996] AJHR I.18A, App F.

¹¹ Privileges Committee, *Interim report on question of privilege on the action taken by TVNZ in relation to its chief executive* (6 April 2006) [2005–2008] AJHR I.17A at 9.

question of whether innovations are necessary to ensure the House can continue to discharge its functions effectively.



David Wilson
Clerk of the House of Representatives

6 October 2020